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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 11.

GEORGE W. MCCANDLESS, as Receiver of Duquesne Gas Corporation,
Petitioner,

against

MAXIME H. FURLAUD, KINGSTON CORPORATION, BYRON CORPORATION and CHAUCER CORPORATION,
Respondents.

MEMORANDUM ON BEHALF OF PETITIONER GEORGE W. McCANDLESS, AS RECEIVER, ETC., IN OPPOSITION TO PETITION FOR REHEARING.

The case of *Sterrett* v. *Second National Bank,* which is referred to at several places in the petition for rehearing, merely held that "A defense that the plaintiff has no title to the asserted right of action is always open * * *" (246 Fed. 758). But the plaintiff in the instant case does not assert title or pretend to have it. The question arising here concerns merely the plaintiff's capacity to sue.

At page 4 the petition states that, if they had been advised that the question passed upon was to be considered, the respondents would have insisted upon a more ample transcript of record in this Court. Here and at page 8 they mention the motion to dismiss made at the end of the trial. But the petition does not state that there is a word in any part of the record below to indicate that the question of

the plaintiff's capacity to sue was ever suggested to the Trial Court. As to the motion to dismiss, it was general (page 182 of record below); the respondents did not suggest the question in connection with it. From the beginning to the end of the trial and upon the submission of briefs after the close of the trial, there was no suggestion of the question to the Trial Court; and this clearly appeared from the answers made by counsel to questions which were put by some of the Justices of this Court upon the argument.

Nor is it enough that there was a technical or constructive denial in the answer, since the question was not actually litigated *nisi prius*.

In *Kansas & A. V. Railway* v. *Dye*, 70 Fed. 24 (C. C. A. 8th 1895), the Court said (p. 26):

> "Parties on appeal must abide by the theories adopted by them in the trial court. They will not be allowed to change their base in the Appellate Court. The pleadings will be treated on appeal as the parties elected to treat them in the trial court."

See also:

First National Bank v. *Commonwealth of Kentucky*, 9 Wall. 353, 19 L. Ed. 701;

Wilson v. *McNamee*, 102 U. S. 572, 26 L. Ed. 234;

Davis v. *Fredericks*, 105 U. S. 4, 26 L. Ed. 938;

Cox v. *State of Texas*, 202 U. S. 446, 50 L. Ed. 1099;

Drexel v. *True*, 74 Fed. 12;

Bort v. *McCutcheon & Company*, 187 Fed. 798;

Arkansas Coal Company v. *Stokes*, 2 Fed. (2d) 511.

Nor could the validity of the complainant's appointment as ancillary receiver be collaterally attacked. In addition to the decisions to this effect cited at pages 25 and 26 of our main brief, we call the Court's attention to the decision of this Court in the following cases, which are, as are the cases cited in our main brief, unsuccessful attempts to assail collaterally the validity of the appointment of receivers or administrators:

Comstock v. *Crawford,* 3 Wall. 396, 18 L. Ed. 34;
McNitt v. *Turner,* 16 Wall. 352, 21 L. Ed. 341;
Simmons v. *Saul,* 138 U. S. 439, 34 L. Ed. 1054;
Shields v. *Coleman,* 157 U. S. 168, 39 L. Ed. 660.

See also:

Voorhees v. *Bank,* 10 Pet. 449, 9 L. Ed. 490;
Grignon v. *Astor,* 2 How. 319, 11 L. Ed. 283;
Sanger v. *Upton,* 91 U. S. 56, 23 L. Ed. 220.

We believe it is proper here to add that the situation presented by the instant case is quite different from that presented by the case of *Mitchell* v. *Maurer,* which is now pending decision in this Court, for in the latter case the validity of the appointment was immediately made the subject of a direct attack.

Respectfully submitted,

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Counsel for Petitioner
George W. McCandless.